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CCM CHEMICALS SDN BHD

v.

URETHANE TECHNOLOGIES SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[COMPANIES (WINDING UP) NO: D8-28-802-2006]
29 JANUARY 2007

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CIVIL PROCEDURE: *Jurisdiction - High Court - Section 23 of the Courts of Judicature Act 1964 - One High Court can accept jurisdiction of other High Court where parties consent in writing - Written consent in the form of jurisdiction clause in agreement*

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COMPANY LAW: *Winding up - Provisional liquidator - Whether appointment invalid - Whether premature - Petitioner failed to satisfy court that company's assets were being dissipated - Non submission of audited account to Registrar of Companies is not evidence of dissipation of assets*

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The respondent applied (in encl. 17) to strike out the petitioner's petition to wind up the respondent company. The respondent claimed that the winding-up petition was filed in the High Court of Malaya whereas the respondent company was not resident in Malaya but in Sarawak and had its registered and business address in Kuching. It was claimed that this court had no jurisdiction to hear a petition which should rightly be presented in the High Court of Sabah and Sarawak. The petitioner

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responded that the respondent had committed itself in credit facility agreement (in cl. 11) to be bound by the jurisdiction of whichever High Court that the petitioner would decide to petition.

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The respondent also applied (in encl. 14) to set aside an *ex parte* order obtained by the petitioner to appoint Mr. David Wong, a Chartered Accountant and Approved Liquidator in preference to the Official Receiver. The petitioner in obtaining the *ex parte* order had claimed that there was an imminent/immediate threat that the respondent will dispose of its assets *inter alia* in the form of immovable/landed properties. The

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respondent's letters were exhibited as clearly showing the respondent's intention to dispose of its properties. The petitioner had further claimed that the respondent had failed to file their audited accounts with the Companies Commission of Malaysia after the audited accounts for the year 1997.

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Held (dismissing encl. 17 and allowing encl. 14):

(1) The correct interpretation of s. 23 of the Courts of Judicature Act 1964 is to allow one High Court to accept jurisdiction "of the other High Court" where the parties "consent in writing". By cl. 11, the parties had so consented. (paras 6 & 7)

(2) Although the petitioner had satisfied the pre-requisite that winding-up order was likely to be made, it had failed to satisfy the court that the respondent was dissipating its assets. The letters exhibited merely showed an attempt on the part of the respondent to settle its debt not only with the petitioner but with other creditors. The fact that the respondent had not submitted an audited account to the Registrar of Companies as required was not under the circumstances evidence of dissipation of assets to justify the appointment of an approved liquidator. Therefore, there was no reason why the court should appoint Mr. David Wong to act as the provisional liquidator. The petition was to follow the normal process. (paras 13, 14 & 15)

Case(s) referred to:
Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***
Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd [1992] 2 MLJ 370 ***(refd)***
Pac Asian Services Pte Ltd v. European Asian Bank AG [1989] 3 MLJ 385 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 231
Courts of Judicature Act 1964, s. 23

For the petitioner - Alex Chang (HL Lim with her); M/s Alex Chang & Co
For the respondent - Janice Yap; M/s Ranjit Ooi & Robert Low

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J:

Enclosure 17

[1] This is an application by the respondent to strike out the petitioner's petition to wind up the respondent company.

[2] The petition was presented by the petitioner on 8 November 2006 pursuant to s. 218 of the Companies Act 1965 on account of the respondent unable to pay its debt.

[3] The application is based on the following grounds:

1. This winding-up petition has been filed in the High Court of Malaya. The respondent company is not resident in Malaya but in Sarawak and has its registered and business address in Kuching. This court has no jurisdiction to hear a petition which should rightly be presented in the High Court of Sabah and Sarawak. It is trite that there are two High Courts of Jurisdiction – being the High Court of Malaya and High Court of Sabah and Sarawak.

2. This court therefore has no territorial authority to hear this petition. See Federal Court decision in *Fung Beng Tiat v. Marid Construction Co.* [1997] 2 CLJ 1 per Gopal Sri Ram JCA (coopted) at 9-10:

> We pause to observe that Abu Mansor J in *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 2 CLJ 11 adopted the correct approach to the question of jurisdiction. Although that was a case which concerned corporate and not personal insolvency, the views there expressed are of relevance to the instant appeal. For present purposes, we find it sufficient to quote from the headnote of the report:
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> > The respondent company was incorporated on 1 September 1982 and had its registered office in Kuching, Sarawak. The petitioner alleged that the respondent was indebted to the petitioner in the sum of $107,357.66 for the price of goods sold and delivered. On 5 September 1988, the petitioner served on the respondent the statutory notice pursuant to s. 218 of the Companies Act 1965 but no payment was received. Hence the petitioner filed the petition to wind up.
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> Held, striking out the petition:
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> (1) The issue of which High Court has jurisdiction over a matter is determined by s. 23 of the Courts of Judicature Act 1964. It is clear that the respondent, residing in Kuching, would come under s. 23(1)(b) of the Courts of Judicature Act 1964.
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> (2) While matters can be heard in any court of the courts of Malaya, it was not the intention of the legislature for any court in Malaya to assume jurisdiction of a mater arising in or which should be filed in a Borneo court. Since the respondent is residing in Kuching, the matter should really be filed in the Borneo High Court, in particular Kuching.
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> (3) From the point of view of convenience, Kuching would be more convenient, with the respondent residing there and the witnesses being there.

> Finally, we refer to the treatment by the learned judge of the conduct of the debtor in relation to the issue of jurisdiction. In our judgments, the doctrine of submission to jurisdiction, which is really part and parcel of private international law, applies to jurisdiction that a court has over a particular litigant, and has nothing whatsoever to do with the territorial authority of a court. The expression 'jurisdiction' is one that takes its colour from its context, and, for that reason, great care must be taken in its use to the facts of a particular case.
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> The answer to the problem in the present case lies in the observation made by Mohd Azmi FCJ during argument that once it is recognized that what was in issue was territorial jurisdiction, then, there could arise no question of a submission. Jurisdiction in the sense in which it applies in the present case cannot be conferred by consent or waiver. The learned judge was quite wrong when he thought otherwise.

Submits: This case clearly illustrates that both the forum conveniens and jurisdiction lie in the High Court of Sabah and Sarawak and not the High Court of Malaya.

[4] The application is opposed by the petitioner on the following grounds:

1. The respondent had committed itself in credit facility agreement to be bound by the jurisdiction of whichever High Court that the petitioner would decide to petition. See encl. 1 exh. A pp. 11 and 12 cl. 11:

> The Company may at the Company's absolute discretion initiate any action or legal proceedings in respect of the Customer's obligations and liabilities herein in any court within Malaysia as the Company deem fit.

2. The decision in Fung Beng Tiat has not dealt with s. 23 of the Courts of Judicature Act 1964:

> 23. Civil jurisdiction-general.
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> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership of which is disputed is situated,

A within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of subsection (1), the
B High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

Reply By The Respondent's Counsel

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1. Section 23 of the Courts of Judicature Act 1964 is concerned only with local jurisdiction and not jurisdiction of the two High Courts.

2. The consent of the respondent even if proved would not override the provision of the law prohibiting a petition which should rightly
D be filed in the High Court of Sabah and Sarawak and not in the High Court of Malaya.

Findings and Decision

E **[5]** The Federal Court in *Fung Beng Tiat* did not address the issue on whether a party who had consented to submit to the jurisdiction of both the High Courts (of Malaya and of Sabah and Sarawak) as in this case can claim that the High Court in one jurisdiction cannot hear a case which should rightly be heard by the High Court in the other jurisdiction.

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[6] I would accept the submission of counsel for the petitioner that the correct interpretation of s. 23 is to allow one High Court to accept jurisdiction "of the other High Court" where the parties "consent in writing".

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[7] It is clear that by cl. 11 *supra* the parties had so consented.

[8] Application dismissed with costs.

Enclosure 14

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[9] This is an application by the respondent to set aside an order obtained by the petitioner to appoint Mr. David Wong, a Chartered Accountant and Approved Liquidator in preference to the matter of course Official Receiver.

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[10] The petitioner had obtained an order on 13 December 2006 by an *ex parte* application pursuant to s. 231 of the Companies Act 1965 supported by an affidavit of the finance manager Geeta a/p Balan (encl. 3) which read as follows:

1. I am the Finance Manager of the abovenamed Plaintiff, a company duly incorporated under the Companies Act 1965 (hereinafter the "CA65") and am duly authorised by the Plaintiff to make this Affidavit on its behalf.

2. Save as otherwise expressly stated, the facts contained herein are from my personal knowledge and/or from information supplied to me and/or from documents which I have access to.

3. I crave leave to refer to the following documents:

3.1 the Petition dated 8th November 2006;

3.2 the Affidavit Verifying Petition of Geeta A/P Balan affirmed on 9th November 2006 and I adopt the averments contained therein;

3.3 the *Ex Parte* Summons in Chambers (Provisional Liquidator) filed herein;

3.4 the *Ex Parte* Summons in Chambers (Disposition of Properties) filed herein;

3.5 the Affidavit in Support (Disposition of Properties) of Geeta A/P Balan affirmed on even date and I adopt the averments contained therein.

Threat Of Dissipation Of Assets

4. I aver that there is an imminent/immediate threat that the Respondent (hereinafter the "company") will dispose of its assets *inter alia* in the form of immovable/landed properties.

4.1 I aver that the company has *inter alia* a property know as Unit No. 176-2-2 Kiara Park, Jalan Burhanuddin Helmi, Taman Tun Dr. Ismail, 60000 Kuala Lumpur.

5. I aver that the company had *vide* its letters dated 28th July 2006 and 17th October 2006 clearly stated its intention to dispose of its properties.

6. I further aver that the company has failed to file their audited accounts with the Companies Commission of Malaysia formerly known as the Registrar of Companies (hereinafter the "ROC") after the audited accounts for the year 1997.

A 6.1 A copy each of the said letters, the report on the company from the ROC dated 30 November 2006 and the statement of particulars to be Lodged With Charge for Urethane Technologies Sdn. Bhd. dated 24 June 1999 are now produced, shown to me, annexed herewith and marked collectively as exh. "GAB-2".

B **Full And Frank Disclosure**

7. I aver that your petitioner has disclosed all the material information and documents in its possession which in his opinion is relevant to the above matter.

C **Liquidators: Officers Of The Court**

8. I have been advised by the solicitors for your petitioner's, Messrs Alex Chang & Co (hereinafter "ACC") that Liquidators are officers of the court subject to the supervision of the court and they have to act fairly, without fear or favour in carrying on the D business of the company so far as is necessary for the beneficial winding up of the company.

8.1 As there is an imminent/immediate threat of the dissipation of assets by the company the appointment of an officer of the court for the above purpose is just and equitable in the circumstances.

E **Likelihood Of The Granting Of An Order For Winding Up**

9. I have been advised by ACC and verily believe that there is good *prima facie* evidence as stated in the petition and the affidavit verifying petition that the company will be wound up, the grounds are *inter alia* as follows: F

9.1 The company *vide* its letter dated 17 October 2006 *inter alia* admitted that the outstanding principal sum due and owing to your petitioner is RM564,384 and requested for a waiver of the finance charges;

G 9.2 Although the company has retained the services of Messrs H. C. Lee & Partners Advocates they have not raised any dispute as to the claim of your petitioner. I aver that therefore there is no dispute on the sum due and owing to Your Petitioner and the company has admitted that it is not in a position to pay its debts.

H **Application Made *Ex Parte*/No Notice Given**

10. I aver that this application must be made *ex parte* as the company, if unrestrained, is at liberty to dispose of their properties pending the hearing of the application *inter partes*.

I 10.1 Wherefore I aver that no notice was given to the company or its solicitors Messrs H. C. Lee & Partners Advocates.

Undertaking As To Damages

11. I aver that the Petitioner do undertake to pay whatever damages the Company may suffer as a result of an order appointing the provisional liquidators.

10. Wherefore I pray for an Order in Terms of the Summons in Chambers filed herein.

[11] The grounds for opposing are as follows:

1. There is no imminent threat that the respondent would be dissipating its assets that a provisional liquidator had to be appointed. There is no evidence of dissipation. The exchange of correspondence merely shows parties were in communication in respect to the alleged debt. All the communications were in response to the petitioner's demand for payment. I say this however without concession that these letters are to be construed as an admission of debt by the respondent. I say this and I rely on these letters to show merely that parties were in communication. This by itself does not justify the petitioner rushing to this Honourable Court to seek a measure so drastic where there was never any basis in the first place to justify the application being *ex parte*. There were no furtive or secretive measures which have allegedly been undertaken by the respondent to dissipate the assets.

2. With respect to the allegation concerning the auditor's account, this is an issue which does not show dissipation of assets. The net result is that there is absolutely no evidence before this Honourable Court to justify the appointment of a provisional liquidator more so on an *ex parte* basis. If it were so, then there would have been more reason for the respondent to be in communication with the petitioner at all times.

Reply By Counsel For The Petitioner:

1. According to the affidavit (encl. 3 – exh. "GAB-2") the letter that was written with respect to the intention to dispose of the properties is clear evidence of dissipation because not all the monies from the proposed sale would be paid to the petitioner in preference to the petitioner.

2. They wrote another letter on 17 October 2006 downgrading their commitment to pay the petitioner from RM250,000 to RM100,000. They are seeking preference to pay the creditors.

A 3. No statutory account. See Singapore case Court of Appeal *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385 at 389 per Wee Chong Jin CJ:

> The court then went on to consider five matters. These included the assertion that money was being siphoned off and the fact that the company made no attempt to deny this assertion; the fact that there were no audited balance sheets and that the company refused to give information; and the consideration that some urgent action in relation to the preservation of assets was needed but none taken. We are therefore of the view that, in the circumstances of our case, the bank must first show a good *prima facie* case of insolvency on the company's part, and then adduce other evidence to justify the appointment of provisional liquidators.
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> There is one further point before we proceed to examine the affidavit of Christopher John Weir filed on 23 January 1986 ('the first Weir affidavit'). Where an *ex parte* application is made for a Mareva injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts (*Bank Mellat v. Nikpour* [1982] Com LR 158). In *The 'Niedersachsen'* [1983] 2 Lloyds Rep 600 at p 611, Mustill J had this to say:
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> > Plaintiffs who seek Mareva relief will do well to bear in mind that the same obligations of candour apply to these proceedings, as to any other form of *ex parte* application.
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> We can find no objection in principle why the same obligation should not be imposed on the bank in its *ex parte* application for appointment of provisional liquidators. Bearing all these principles in mind, was the first Weir affidavit one capable of supporting the *ex parte* application? The affidavit stated that the statutory demand of 21 December 1985 was served on the company by hand at its registered office. It also annexed a copy of the petition filed on 23 January 1986. These were obviously done to establish a *prima facie* case of the company's insolvency. But, as we have already seen, the demand was admittedly never served at the registered office, and the petition, in so far as it was founded on s. 254(1)(e) read with s. 254(2)(a), was defective. The alternative assertion, relying on s. 254(2)(c), was similarly defective in that it was a bare allegation. Although the amended petition may have rectified this defect, it remains that there was a defective petition before Chua J on 24 January 1986.

4. As for the authority when court can act under s. 231 to order an approved liquidator, see *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370 per VC George J at Held (1): A

> Section 231 of the Act confers on the court an unfettered discretionary power but that power must be exercised in a proper judicial manner. In the proper exercise of its discretion the court must be satisfied that ultimately the court is likely to make the winding-up orders sought in the petition. B

[12] And at 375 G – 376: C

> The power to appoint a provisional liquidator is given to the court by s. 231 of the Companies Act 1965. It can be exercised at any time after the presentation of a winding-up petition and before the making of a winding-up order. Rule 35(1) of the Companies (Winding-Up) Rules 1972 elaborates on the power – the application for the appointment has to be made by 'any creditor or contributory' who should prove 'sufficient ground' for the appointment by affidavit. Creditor is defined in r. 2 to include a corporation or a firm. No distinction is made between a secured or unsecured creditor. In fact no qualification is made in respect of 'any creditor'. D E
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> As the equipollent provisions in England and in Australia are in *pari materia* with our provisions, it is relevant to see how the courts in those jurisdictions have approached these provisions.
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> Now, it is to be observed that the discretionary power given by s. 231 is in quite general terms. Sir Robert Megarry V-C could see no hint in the English equipollent section (s. 238 of the 1948 Act) that the section is to be restricted to only where the company is obviously insolvent or where the assets are in jeopardy – see *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 (folld) at p. 893b. The section confers on the court an unfettered discretionary power but as the learned Vice-Chancellor puts it 'that power must obviously be exercised in a proper judicial manner'. The Australian courts have taken the same obvious view – see, for instance, *Re McLennan Holdings Pty Ltd* [1983] 7 ACLR 732 (refd) at p. 737 where *Pitt v. Bachmann* [1980] 5 ACLR 282 (refd) and *Re ML Industries Pty Ltd* [1981] 5 ACLR 769 (refd) were followed in respect of the holding that after the due presentation of a petition to wind up which discloses proper grounds for winding up, the discretion to appoint a provisional liquidator is not limited. F G H
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> The 'sufficient ground' for the appointment required by the rule has been the subject of judicial discussion both in Australia and in England. The circumstances in which the courts have made the orders vary infinitely. I think it is useful to quote the passage I

from the 1975 judgment of Bright J of the Supreme Court of S Australia in *Re Club Mediterranean Pty Ltd* [1975] 11 SASR 481 (refd) at p. 484 that McPherson on *The Law of Company Liquidation* (3rd Ed) quotes at pp. 100 and 101:

> Where the petitioning creditor makes the application and the company opposes it the court must come to a conclusion as to the degree of urgency and of need established by the petitioning creditor and the balance of convenience. The circumstances will vary. Sometimes the company may be continuing to trade at a loss or to incur further liabilities. Sometimes assets may require to be protected from dissipation or from seizure or encumbrance. Sometimes the right of the company to assets or the right to exercise an option, enforce a contract, reject a claim or otherwise to act for the apparent benefit of the company may be in issue and the issue may need to be resolved or carried forward or rights may need to be protected as a matter of urgency. Sometimes the company may be paralysed by a dispute between shareholders or directors, or by some form of interim court order. Sometimes there may be a conflict of interest between a director or principal officer of the company itself with regard to some right of property, and that conflict may render it difficult for the company's rights to receive proper protection.

As has been seen, in deciding whether to appoint a provisional liquidator the courts have repeatedly stressed that they have a wide discretion. Some examples are given by McPherson at p. 101:

> Accordingly, provisional liquidators have been appointed: to investigate the affairs of the company in its own right or in its capacity as a trustee, to enable the company to complete current contracts, to enter into new contracts and execute the relevant documents; and to represent the company in legal proceedings.

Now the appointment of a provisional liquidator has been described as having the effect of paralysing the company – see McPherson at p. 99. It is for this reason that it has been judicially established that on the proper exercise of its discretion the court must be satisfied that ultimately the court is likely to make the winding-up orders sought in the petition which has been described as the 'threshold test' in *Re Qintex Ltd (No 3)* [1990] 2 ACSR 627 (refd) at p. 638. *In Re McLennan Holdings Pty Ltd* [1983] 7 ACLR 732 (refd) at p. 738, Master Lee said:

> Whilst the ultimate fate of the petition must be left to the court finally hearing the matter, a provisional liquidator will not usually be appointed unless it appears in the material

> that a winding-up order is likely ... This presupposes that there should be adequate evidence adduced on an application for appointment of a provisional liquidator to show that a winding up is, in the absence of material to the contrary, likely.

5. Winding-up order is most probable.

Findings And Decision

[13] Applying the established principle cited by counsel for the petitioner it is clear to me that the petitioner had satisfied the pre-requisite that winding-up order is likely to be made. However, it has failed to satisfy this court that the respondent is dissipating its assets. The letter exhibited merely shows an attempt on the part of the respondent to settle its debt not only with the petitioner but with other creditors.

[14] The fact that the respondent had not submitted an audited account to the ROC as required is not under the circumstances evidence of dissipation of assets to justify the appointment of an approved liquidator.

[15] There is no reason why this court should make an order to appoint Mr. David Wong to act as the provisional liquidator. The petition should follow the normal process.

[16] Application to set aside is allowed with costs. Order in terms of the application.